SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1969.

No. 596.

HARRY R. ILLMAN,

Petitioner,

vs.

THE TOLEDO BAR ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

BRIEF OF RESPONDENT IN OPPOSITION.

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Respondent The Toledo Bar Association opposes the petition filed herein for a writ of certiorari and prays that such petition be denied.

QUESTIONS PRESENTED.

The questions presented for review, as stated by petitioner, are not accurately "expressed in the terms and circumstances of the case" (see paragraph 1 (c) of Rule 23). The inaccuracies are noted *infra* in respondent's statement of the case.

STATEMENT OF THE CASE.

Respondent sets forth here certain facts material to the consideration of the petition for writ of certiorari which were not included in petitioner's statement or which were inaccurately presented therein.

The Supreme Court of Ohio found that petitioner violated Canon 11 of the Canons of Professional Ethics by depositing his client's funds in his one and only checking account (Petitioner's Appendix A, pp. 13-15). These facts and the fact that he endorsed his client's name on the settlement draft were freely admitted by petitioner in his testimony given before the hearing panel of the Board of Commissioners on Grievances and Discipline (Appendix, p. 10, *infra*). It is also undisputed that respondent's bank account, as shown by the reconciliation statement therefor (Exhibits 23 and 23A), reached the very low figure of $9.81 on May 11, 1966.

Inasmuch as the fact of commingling was established by respondent's own testimony, it seems unnecessary, for the purposes of this brief in opposition to the petition for a writ of certiorari, to narrate other evidentiary matters involved in these proceedings which were omitted from petitioner's statement of the case and which relate to certain of the evidence referred to therein by him.

Contrary to the statements made by petitioner in his petition to this Court and the inferences therefrom apparently intended by him (see Petition, pp. 7 and 9), the record of the proceedings before the hearing panel of the Board of Commissioners establishes that *respondent,* not petitioner, offered evidence pertaining to the prior conduct of petitioner as an attorney at law, that such evidence was rejected by the hearing panel *upon objection made by petitioner,* and that petitioner *voluntarily refrained* from offering at such hearing materials relating to his prior conduct (Appendix, pp. 10-11, *infra*). Incidentally, these

materials consisted of *ex parte* written statements or letters, and a great number of such testimonials was placed by petitioner before the Supreme Court of Ohio.

The evidence proffered by respondent with respect to petitioner's prior conduct related to proceedings in the Court of Common Pleas of Lucas County, Ohio, which resulted in 1952 in an order suspending petitioner from the practice of law for a period of five years. This evidence is a part of the record and was proffered by respondent to the Supreme Court of Ohio for consideration in connection with the imposition of a penalty once misconduct was determined.

Inasmuch as petitioner has placed in issue whether due process of law was accorded under the disciplinary procedure prescribed by the Supreme Court of Ohio, a brief outline of the pertinent provisions of Rule XVIII of the Supreme Court of Ohio is in order.

This procedure provides for notice to the attorney of the nature of the charge made against him, a formal hearing before a hearing panel of three members of the Board of Commissioners, the right to counsel, the observance of all rules of evidence at such hearing, the preparation of a transcript of such hearing, the review of the entire proceedings by the full Board of Commissioners, the right to file written objections with the Supreme Court of Ohio to the report certified to it by the board, and a hearing before the court on any such objections. The respective responsibilities of the board and of the court in disciplinary proceedings were made clear by the Supreme Court of Ohio in *Mahoning County Bar Association vs. Ruffalo,* 176 Ohio St. 263 (1964), at 263-264, 199 N.E.2d 396, at 398, when it said:

> "In cases of this kind, the board of commissioners acts for and on behalf of this court. In doing so, it makes recommendations as to the facts which should be found and the action which should be taken by this

Court. However, this Court has full responsibility for determining what the facts are and what action should be taken on those facts."

REASONS FOR NOT GRANTING THE WRIT.

Petitioner states that he seeks a writ of certiorari under Rule 19, which authorizes a review "where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court." (Petition, p. 1.)

Petitioner cites authority in his petition showing that this Court has held the constitutional right to due process of law applicable to disciplinary proceedings involving a lawyer. With this proposition respondent readily agrees. Petitioner must be said to seek a writ of certiorari only on the basis that the state has decided a federal question of substance "in a way probably not in accord with applicable decisions of this Court."

In *Dohany vs. Rogers,* 281 U.S. 362 (1930), this Court made the following pertinent observation at page 369:

> "The due process clause does not guarantee to the citizens of a state any particular form or method of state procedure. Under it he may neither claim a right to trial by jury nor a right of appeal. Its requirements are satisfied if he has reasonable notice and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceeding and the character of the rights which may be affected by it. *Reetz v. Michigan,* 188 U.S. 505, 508; *Hurwitt v. North,* 271 U.S. 40; *Bauman v. Ross,* 167 U.S. 548, 593; *Backus v. Union Depot Co., supra,* p. 569."

More recently, it was said in *Federal Trade Commission vs. National Lead Co.,* 352 U.S. 419 (1957), at 427:

> "It goes without saying that the requirements of a fair hearing include notice of the claims of the opposing party and an opportunity to meet them. *Morgan v. United States*, 304 U.S. 1 (1938)."

A brief review of the proceedings undertaken by petitioner under Rule XVIII of the Supreme Court of Ohio demonstrates quite convincingly that due process of law was accorded to and fully utilized by him. Petitioner took the depositions of three witnesses before the matter was assigned for hearing before the hearing panel appointed by the Board of Commissioners on Grievances and Discipline. He attended the formal, full hearing before the hearing panel and offered numerous exhibits and the testimony of three witnesses in addition to his own. He was represented by able counsel. The entire proceedings were transcribed and later the matter was fully argued before the hearing panel by petitioner through his counsel, both by written brief and by subsequent oral argument. After the Board of Commissioners certified its report to the Supreme Court of Ohio and made its recommendations with respect thereto, petitioner submitted his written objections and supporting brief to the Supreme Court of Ohio in accordance with its rule, and, after oral hearing before that court, a judgment was ultimately entered therein. Thereafter petitioner filed a motion for rehearing, which was submitted to the court on written briefs and subsequently overruled.

It is obvious from the foregoing review of the procedures undertaken by petitioner that he exploited to the fullest his opportunity to present his defense in this matter, and that he had full opportunity to do so.

It is true, as stated on page 9 of the petition herein, that the hearing panel sustained motions seeking to keep from the record evidence concerning petitioner's prior

conduct, but it should be noted that the motions were made by *petitioner* with respect to evidence *proffered by respondent.* Petitioner can hardly be heard to complain of the panel's refusal to admit evidence which he successfully asked the panel to reject.

Moreover, as petitioner stated on the first page of the addendum to his brief filed in the Supreme Court of Ohio with his written objections to the certified report of the Board of Commissioners, he voluntarily refrained from submitting to the hearing panel many of the testimonials favorable to petitioner (which, incidentally, were proffered to the Supreme Court of Ohio with this addendum) (see Appendix, *infra*, p. 12). Certainly, petitioner cannot properly complain of his own reluctance to avail himself of the opportunity to offer before the panel such evidence as he deemed advisable with respect to his prior conduct and character.

Petitioner has cited authorities to the effect that character evidence should be given weight in considering the sanction to be imposed. Obviously, these authorities relate to the penalty or discipline to be imposed once the violation of the canons or the misconduct is found. Respondent agrees that petitioner's character and record of prior conduct are pertinent to the determination of the type of discipline to be imposed once the misconduct has been determined, and the Supreme Court of Ohio made it clear in the last paragraph of its opinion that, once misconduct was found, petitioner's professional record was considered by the court in determining what discipline should be imposed (Petitioner's Appendix A, p. 15). Clearly, petitioner cannot have been deprived of due process of law when in fact his character and prior record were given consideration in determining the type of discipline to be imposed.

Petitioner next complains of the fact that the Supreme Court of Ohio has held proof by a preponderance of the evidence sufficient to sustain a finding of misconduct (Petition, p. 10).

It should be pointed out that the three cases cited by petitioner on page 10 of his petition, *In re Ruffalo,* 390 U.S. 544, *In re Gladstone,* 28 F. Supp. 858, and *In re Ryder,* 263 F. Supp. 360, all concerned disciplinary procedures within the federal court system itself and did not concern the quantum or character of proof necessary in state court disciplinary proceedings. In fact, nothing is said in the *Ruffalo* decision, 390 U.S. 544, regarding the quantum of proof necessary in disciplinary proceedings, although it appears in the petition (p. 10) as being cited in support of the proposition that proof in such proceedings must be clear and convincing.

In *Leland vs. Oregon,* 343 U.S. 790 (1952), this Court held that the fact Oregon imposed a heavier burden of proof on an accused to establish his insanity than by a preponderance of the evidence, as is required in some other states, was not a difference of such magnitude as to raise a constitutional question. See also Mr. Justice Black's opinion in *Powell vs. Texas,* 392 U.S. 514 (1968), where at page 545 he refers to "the indefensibility of imposing on the States any particular test of criminal responsibility."

Reference is also made to *Speiser vs. Randall,* 357 U.S. 513 (1958), at 523, where this Court again acknowledged the power of a state, within fundamental principles of justice, "to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion."

Petitioner next says that, whichever burden of proof may be imposed, the evidence does not support the finding

of commingling. Even if his admission of the deposit of the client's draft in his one and only bank account must be ignored, to require this Court to review and weigh the evidence in order to determine whether it would have come to the same conclusion as did the Supreme Court of Ohio is far more than due process of law requires. Petitioner had full opportunity to offer evidence in his defense and avail himself of every opportunity to defend himself against the charges lodged against him. The requirements of due process were fully satisfied, and petitioner has no basis to complain in this regard.

The leading case of *Selling vs. Radford*, 243 U.S. 46 (1917), although dealing with disciplinary proceedings in the federal court system, has long been recognized as laying down the rule defining the limits of a review by this Court of decisions of state courts in disbarment proceedings. At pages 50-51 of its opinion in the *Selling* case, this Court said:

> "* * * That is to say, we are of opinion that we should recognize the condition created by the judgment of the state court unless, from an intrinsic consideration of the state record, one or all of the following conditions should appear: 1. That the state procedure from want of notice or opportunity to be heard was wanting in due process; 2. That there was such an infirmity of proof as to facts found to have established the want of fair private and professional character as to give rise to a clear conviction on our part that we could not consistently with our duty accept as final the conclusion on that subject; or 3, that some other grave reason existed which should convince us that to allow the natural consequences of the judgment to have their effect would conflict with the duty which rests upon us not to disbar except upon the conviction that, under the principles of right and justice, we were constrained so to do."

None of these three conditions exists in the instant case.

Petitioner's next and last complaint that the penalty of indefinite suspension is unwarranted and unduly harsh is entirely without merit. In fixing the penalty, the Supreme Court of Ohio probably took into account, in its consideration of petitioner's professional record, the order of the Court of Common Pleas of Lucas County, Ohio, in 1952, which suspended him from the practice of law for five years.

The handling of a client's funds is a major responsibility of every lawyer. Any mishandling thereof cannot be treated lightly, for trustworthiness is fundamental to the practice of law and the maintenance of a good attorney-client relationship.

CONCLUSION.

It is earnestly maintained that petitioner has failed to show any grounds for the granting of a writ of certiorari and that his application therefor should be denied.

Respectfully submitted,

CHARLES E. IDE, JR.,
and
JAMILLE G. JAMRA,
Attorneys for Respondent.

APPENDIX.

Excerpts From Transcript of Proceedings Before Panel of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio.

November 13, 1967.

Testimony of Mr. Harry Illman upon cross examination, page 293 of transcript:

Q. Now, this Toledo Trust Account which has been identified as bearing No. 0096292 which carried the label "Business Account," is the only account that you had at any bank in February of 1966, wasn't it? A. I think that's right.

Q. And you used this account for your business purposes as well as your personal matter, is that right? A. That's true.

Q. The endorsement of Rosie William's name on the draft, Exhibit 1A, was in your handwriting, isn't it? A. Yes.

Q. And the check was—that draft was deposited in this account of yours with Toledo Trust Company on February 16, 1966, is that correct? A. I believe that's right.

* * * * *

Offer and rejection of Exhibits 13 and 14 relating to prior disciplinary proceedings involving Mr. Harry Illman:

Mr. Jamra: * * * Relator's Exhibit 13, are the original charges and specifications filed in the Court of Common Pleas, Lucas County, Ohio, in Cause No. 175689, in the Matter of the Complaint against Harry R. Illman, filed October 1, 1952.

Mr. Dreidame: Are you offering this one at this time; is there an objection to it?

Mr. Lancione: I understand he's just marking them now.

Mr. Dreidame: Okay; very well.

Mr. Jamra: In Relator's Exhibit 14, it is the original Journal Entry in the same Cause Number 175689, filed on December 2, 1952. * * *

Mr. Jamra: I'll offer Exhibits 13 and 14.

Mr. Lancione: I'd like to object separately as to both 13 and 14.

First of all, as to the reasons indicated as to the previous exhibits on the question of relevancy and materiality, and with respect to Exhibit 13 an additional basis for the objection on that, being, that all that recites is charges and specifications.

I don't know of any basis for bringing to the attention of this panel charges as such. The Journal Entry will speak for itself. I've had an opportunity to review it to the extent that the charges and specifications have been found well taken, and I would assume that they would be reflected in the Journal Entry.

Seems to be inappropriate in addition to the Journal Entry, assuming the materiality of what Mr. Jamra is presenting in Exhibit 14; would be inappropriate also to add charges and specifications without something more, and I would move separately that Exhibit 13 for the reasons I've indicated—

Mr. Dreidame: At this time the panel will sustain the objection. If in a later stage of the proceedings the opinion of the panel is that these have become material by anything else that is introduced or developed, there could be a change in the ruling; but, at this time the ruling is that the objection is sustained—that is, to 13 and 14.

* * * * *

Excerpt from page one of Addendum to Brief Filed on Behalf of Mr. Harry Illman in Supreme Court of Ohio.

While many of the attached letters were in the possession of counsel for respondent [Mr. Illman] at the time of the hearing, he was reluctant to tender them into the Record in view of the Panel's ruling on the relevance of evidence pertaining to previous disciplinary action involving Respondent.

* * * * *